

# THE VERDICT OF HISTORY

*The History of Michigan Jurisprudence Through Its Significant Supreme Court Cases*



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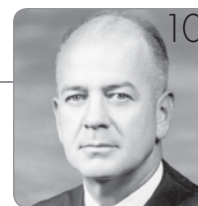
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## The Mid-Twentieth Century: 1940–1970

In the late 1950s and 1960s, with a majority of the justices coming to the Court during the period G. Mennen (“Soapy”) Williams was governor, 1948 until 1960, there was a considerable impact on the jurisprudence of Michigan. In fact, in 1971, Williams would join the Court himself and serve for the next 15 years, and his lieutenant governor and successor, John Swainson, also joined the Court in 1971. During this period, the Michigan Supreme Court clearly established itself as the dominant power in the state’s judicial system, bringing the lower courts of the state under its direction. The Court also played a part in the long-running effort to reapportion the state legislature and bring it into line with the democratic principle of “one person, one vote.” The state’s high-court approach was often similar to that of the United States Supreme Court, which ushered in a period of dramatic and

sometimes controversial judicial change under Chief Justice Earl Warren (1953–1969). Though the cases decided during this period gave rise to many confrontations within the Court, and between the Court and the legislature, they ultimately strengthened the power and independence of the Michigan Supreme Court. The state’s fourth constitution, in 1963, reflected this development, establishing that “the judicial power of the state is vested exclusively in one court of justice,” with the Supreme Court at the top.

And no discussion of the decisions of the Michigan Supreme Court could be complete without an opinion by its perhaps best-known justice, John D. Voelker—better known as Robert Traver, the author of the novel and later film *Anatomy of a Murder*. Voelker was a colorful character, of great wit and literary talent, who also shared the liberal character of the Court in these years.

# *Book Tower Garage v United Auto Workers*

## Michigan's New Deal

295 Mich 580 (1940)

The Great Depression that began in 1929 caused the greatest political upheaval since the Civil War. It ended a 70-year period of Republican dominance in American politics and turned Michigan from a solidly Republican state into a competitive two-party state. Above all, Franklin D. Roosevelt and the New Deal Democratic Party signaled a popular acceptance of a much larger role for the government in the socioeconomic system. The nineteenth-century political economy of classical or “laissez-faire” liberalism gave way to a more centrally regulated, bureaucratic order. Organized labor became one of the most powerful interest groups in the New Deal political coalition, and the United Auto Workers became a political force in Michigan. The Michigan Supreme Court made an important gesture recognizing the new place of labor unions in the 1940 *Book Tower* decision; the decision reversed several decades of labor law and gave greater license to unions to picket during strikes.

In the late nineteenth century, the United States was transformed from a rural and small-town agricultural economy into an urban and industrial one. Millions of people moved from the countryside, both American and European, into industrial wage labor. The law of industrial labor relations was largely established by the Civil War. The northern, Republican, abolitionist vision of “free labor” triumphed over the southern system of chattel slavery. In essence, the free labor philosophy applied the contractual idea discussed in the *Sherwood*<sup>1</sup> case to labor relations. The state took for granted that competent parties were free to make employment contracts on any terms they found mutually advantageous. Employer and employee were perfectly equal before the law; neither party could use force or compulsion on the other. Coercion was the essence of slavery; its absence defined free labor. What resulted was known as “employment at will.” Either party could terminate the contract for any reason whatsoever—employers could not force employees to work, nor could employees compel employers to retain them, if the other party did not desire it. The state would not interfere as individuals bargained over wages, hours, and working conditions.

By and large, Americans accepted the free labor or “laissez-faire” system. The overall benefits of a free market outweighed the harshness, selfishness, and even cruelty, that the ethos of “every man for himself, and the devil take the hindmost,” might promote.



The UAW, which was founded in May 1935 in Detroit, began a strike on the Book Tower Garage in 1940.

UAW logo used with permission of the UAW Public Relations Department.

Critics, reformers, and radicals in the nineteenth century denounced the whole philosophy, arguing that the formal equality of employer and employee was a sham and that the overwhelming power of corporations permitted them to impose “wage slavery” on their workers. Roscoe Pound, the dean of Harvard Law School and one of the chief critics of laissez-faire legalism, observed that it was absurd for judges to pretend that a billion-dollar corporation like U.S. Steel and a penniless immigrant really bargained about the terms and conditions of employment, “as if [they] were farmers haggling over the sale of a horse.”<sup>2</sup>

To some degree, the states and federal government took steps to mitigate the harshness of the system. They enacted laws that prohibited child labor, limited the hours that women could work, and limited the hours even of adult males in particularly hazardous occupations. Labor unions were among the more controversial and legally contentious ways in which workers tried to reform the industrial labor-relations system. Simply put, labor unions were voluntary associations of workers who tried to use their combined power to augment their individual bargaining power with their

employers. Legally, they were perfectly free to attempt to do so. It is unclear whether American courts ever actually regarded labor unions as inherently “criminal conspiracies,” although they were “combinations in restraint of trade.” The 1842 Massachusetts decision, *Commonwealth v Hunt*, explicitly recognized the legality of labor unions.<sup>3</sup> The problems came when unions attempted to compel employers to bargain with them, since employers had the right, in “free labor” terms, to refuse to recognize unions, and indeed to fire employees who joined unions.

The next step after gaining legal recognition/exemption from criminal conspiracy prosecution for union members who faced recalcitrant employers was to begin a “strike,” to withhold their labor in an effort to bring economic pressure on their employer. In most cases, workers were perfectly free to quit *en masse*; they could not be compelled to work. However, in most cases, industrial workers could be easily replaced and business would continue as usual. Thus, unionists adopted tactics such as boycotting and picketing, in which they would try to persuade other workers not to take their jobs and to persuade customers to refuse to deal with struck employers. Employers responded in kind, using professional strikebreaking firms, detectives and spies, and blacklisting union organizers. Strikes had a tendency to degenerate into violence, with threats and assaults used against the “scabs” and “finks” who would replace striking workers. “With few exceptions,” one study notes, “labor violence in the United States arose in specific situations, usually during a labor dispute. The precipitating causes have been attempts by pickets and sympathizers to prevent a plant on strike from being reopened by strikebreakers, or attempts of company guards, police, or even National Guardsmen to prevent such interference.”<sup>4</sup> Something akin to industrial warfare accompanied the great railroad strike of 1877, the Homestead strike of 1892, and the Pullman strike of 1894. Public opinion usually turned against the unionists when violence broke out, and at that point the power of the state, and courts in particular, broke most strikes.

Many observers doubted that strikes could be anything other than coercive. “Those who tell you of trade-unions bent on raising wages by moral suasion alone are like people who tell you of tigers that live on oranges,” Henry George said in the late nineteenth century.<sup>5</sup> “There is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching,” a federal judge said in 1905.<sup>6</sup> Thus, workers had the right to organize unions, and to strike, but very few means to make a strike *effective*. “From the definitions given,” noted one late nineteenth-century treatise, “all strikes are illegal. The wit of man could not devise a legal one. Because compulsion is the leading idea of a strike.”<sup>7</sup>

Labor leaders regarded such opinions as evidence that the state, and the courts especially, were animated by class prejudice. They were especially incensed at the development of the injunction in labor disputes. Employers whose businesses were threatened by strikers resorted to equity proceedings. Equity was a legal system separate from that of the common law. In English history, there were prerogative courts where special judges (“chancellors”) could provide extraordinary remedies in cases in which the common law was inadequate. In strikes, employers could not sue a union (they were almost never incorporated), or await suit or prosecution of its individual members. Local law-enforcement officers were often overwhelmed, or sympathetic to the strikers, and the owner might suffer irreparable harm as he sought legal redress. Judges issued injunctions—orders to strikers to desist from interfering in the employer’s business. Preliminary injunctions could be issued quickly, with only the employer’s testimony and without any kind of jury trial. If strikers violated the injunction, they could be cited for contempt of court, fined, and jailed. Injunctions thus could be effective instruments for foiling strikes.

The federal courts and state courts issued injunctions in labor disputes, and the United States Supreme Court overturned congressional and state efforts to limit injunctive relief for employers.<sup>8</sup> Though they were always granted after violence or threats, injunctions sometimes prohibited even peaceful picketing.<sup>9</sup> The Michigan legislature enacted the Baker Conspiracy law in 1877, prohibiting intimidation of workers, destruction of property, and interference in business. It was repealed in 1891, but the courts extended the same protection, particularly in the Supreme Court’s 1898 *Beck* decision.<sup>10</sup> Jacob Beck and Sons, a grain milling company, sought an injunction against the Railway Protective Association, which demanded that Beck agree to their terms of employment and hire only union members. Beck refused, and the union engaged in a variety of threatening and violent acts. Beck won an injunction from the circuit court against violence and threats, but sought a Supreme Court modification of the injunction to prohibit all picketing. In a unanimous opinion, the Court granted the wider injunction, stating that “The law sanctions only peaceful means,” whereas the boycott and picketing were “threatening in their nature.”<sup>11</sup>

Organized labor mounted a campaign to defeat Justice Claudius B. Grant, the author of the *Beck* decision, in his 1899 reelection bid, but failed. The Supreme Court repeatedly affirmed *Beck* over the next 25 years.<sup>12</sup> Michigan’s Supreme Court was the only state high court that ever ruled that completely peaceful picketing could be enjoined.<sup>13</sup> This is not to suggest that picketing ceased in Michigan. Employers did not always seek injunctions against picketing; some courts tried to interpret the *Beck* rule in a way that would permit picketing; unions continued to picket despite injunctions, for a great deal depended on local enforcement of court orders.<sup>14</sup>

Federal and state governments gradually adopted more pro-union policies in the first third of the twentieth century. The effort had the greatest effect in the railroad industry, because of the economic power of skilled railroad brotherhoods and the devastating effects of nationwide transportation disruptions. Congress attempted



The Flint auto plant strikes were among the most important strikes in Michigan and laid the groundwork for later strikes like the one at Book Tower Garage. Here, union workers and sympathizers march toward a rally supporting the Flint auto plant strike in Detroit’s Cadillac Square in early 1937.

© Detroit News Archive, “The historic 1936–37 Flint auto plant strikes,” June 23, 1997. Reprinted by permission of the Detroit News.

## Book Tower Garage v United Auto Workers

It is hard to comprehend how overwhelmingly Republican Michigan had been. Republicans had carried Michigan in every presidential election since 1856. They had won 34 of 38 gubernatorial elections, and took every statewide elective office except one since 1854. They controlled every legislative session except one, and in 1924 there was not a single Democrat elected to the state legislature. “The Michigan Democratic party was near extinction by 1930,” one historian observes.<sup>1</sup> The Depression saved it. The party made small gains in the 1930 election, especially in the large cities. In 1932, Michigan gave its first post-Civil War presidential electoral vote to a Democrat, gave control of the legislature to the Democrats, sent a majority-Democrat delegation to Congress, and elected a Democrat governor for the first time since 1912.<sup>2</sup>

1. Ortquist, *Depression Politics in Michigan, 1929–33* (New York: Garland, 1982), p. 38; Dunbar & May, *Michigan: A History of the Wolverine State*, 3d ed. (Grand Rapids: Eerdmans, 1995), pp. 515–519. Under the 1908 Constitution, Michigan Supreme Court elections were overtly partisan until 1939. After 1939, parties could nominate judicial candidates at their conventions, but no partisan affiliation appeared on the ballot. It seems that no Democrat was elected to the Michigan Supreme Court in the twentieth century until George E. Bushnell in 1934.

2. Dunbar & May, *Michigan*, *supra*, p. 519.

to curb federal court injunctions and to exempt unions from antitrust prosecutions. Some state courts adopted a more pro-union stance on picketing than Michigan’s.<sup>15</sup> But it was not until the Great Depression, and the political turnover that it brought about, that unions made significant legal advances.

Michigan agriculture and mining were already ailing in the generally prosperous 1920s, but industrial employment was booming. The economy went into a slump in mid-1929, and in the next year, 20 percent of Michigan’s non-farm work force was unemployed. Auto production fell from five million to barely one million. Unemployment reached 30 percent in 1931, over 40 percent in 1932, and perhaps 50 percent in 1933, the worst year of the Depression. The distress caused by the Depression spelled doom for the Republican Party in the state.

Organized labor became a major constituency in the New Deal coalition. The American Federation of Labor (AFL) was already making its power felt during the Hoover administration, lobbying to prevent the confirmation of John J. Parker to the United States Supreme Court and securing the passage of the Norris-LaGuardia Act, which effectively limited federal courts’ power to issue injunctions in labor disputes. Roosevelt’s legislative centerpiece, the National Industrial Recovery Act, contained a provision to promote collective bargaining, though this was largely evaded by employers and the act was struck down by the United States Supreme Court. Congress then enacted a stronger labor law, the National Labor Relations (Wagner) Act, in 1935. This statute compelled employers to recognize and bargain with unions elected by a majority of their workers, outlawed various anti-union tactics, and established a National Labor Relations Board to enforce the act. With all of these legislative encouragements, the power of labor unions grew, culminating in the formation of the Congress of Industrial Organizations (CIO), led by

John L. Lewis of the United Mine Workers, which set out to organize unskilled workers in the mass-production industries like autos, steel, rubber, and meatpacking.

The CIO threw itself completely behind Roosevelt and the Democrats, producing even greater Democratic majorities in 1934 and 1936. In Michigan, labor backing helped to restore the governorship to the Democrats, aiding in the election of Frank Murphy, whom President Roosevelt had campaigned for. Many large employers expected the United States Supreme Court to strike down the Wagner Act, and resisted the drives by the AFL and CIO to organize their plants. Some of the most violent clashes occurred in the Michigan auto industry. The United Auto Workers (UAW) went beyond picketing and adopted a new tactic, the “sit-down strike,” in which strikers occupied and refused to vacate auto plants. An increasing number of law-enforcement officials, sympathetic to unions, refused to enforce court orders against strikers. Governor Murphy made it perfectly clear that he would not use force to oust the sit-down strikers. Some of the largest industrialists, like General Motors and U.S. Steel, came to terms with the CIO; others resisted and benefited from a public backlash against the militant sit-down tactic. In 1937, when Chicago police killed 10 strikers outside of the Republic Steel Plant, Roosevelt’s reaction was to express “a plague o’ both your houses.” The United States Supreme Court ultimately held that sit-down striking was illegal.<sup>16</sup> Governor Murphy lost his re-election bid in 1938, a year in which Democrats suffered major setbacks, but was appointed U.S. attorney general and then to the United States Supreme Court in 1940.

These national changes soon had an impact on Michigan labor law. In 1940, the United Auto Workers attempted to organize the Book Tower Garage, an auto-service business in Detroit. When J. B. Book fired union organizers, the UAW claimed that he had violated the Michigan version of the National Labor Relations Act, and began a strike. Their picketing drove away Book’s chief suppliers and customers, and Book sought an injunction in Wayne County Circuit Court, producing affidavits showing violence and intimidation that had interfered with his business. Like an increasing number of circuit courts, the court issued an injunction that prohibited violence and intimidation, but allowed peaceful picketing. Book appealed to the Michigan Supreme Court for a broader injunction that would prohibit all picketing.<sup>17</sup>

By 1940, Democrats had obtained a majority of seats on the Michigan Supreme Court, with the four justices elected in 1934, 1936, and 1938 (George E. Bushnell, Edward M. Sharpe, Bert D. Chandler, and Thomas F. McAllister). A Republican, Harry S. Toy, was appointed in 1935, but was defeated when he sought election in 1936.<sup>18</sup> The Democratic tidal wave led Republicans to propose an appointive system to replace the elective system that had been in place in Michigan since 1850. An amendment to do so was voted down in 1938, but the next year a constitutional amendment provided that justices appear on the ballot without a partisan identification, though they could continue to be nominated in partisan primaries.<sup>19</sup> While the Court was considering Book’s appeal, the United States Supreme Court struck down an Alabama law that prohibited peaceful picketing. The opinion, *Thornhill v Alabama*,



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written by the former governor and newly appointed Justice Frank Murphy, declared that picketing was “free speech” and protected against state encroachment by the Fourteenth Amendment.<sup>20</sup> The Michigan Supreme Court followed suit and denied Book’s request for a broader injunction, without precisely overturning *Beck*. “The law has always sanctioned peaceful means of advertising a labor dispute,” Justice Butzel claimed; it condemned only “force, violence, threats of force or violence, intimidation, or coercion.” There could be such a thing as peaceful picketing, and such peaceful picketing was now protected as an exercise of free speech.<sup>21</sup>

Just as *Beck* and its progeny did not end picketing in Michigan, so *Book Tower Garage* did not give unions an unlimited right to picket. Almost immediately after *Thornhill* and *Book Tower*, the courts began to retreat from the implications of the picketing-as-free-speech doctrine. In 1941, the United States Supreme Court adopted a rule very much like *Beck*’s, that even peaceful picketing could be prohibited when it took place in a general atmosphere of violence.<sup>22</sup> In several other cases during the decade, the “Court moved consistently toward the position that picketing was so bound up with elements of economic coercion, restraint of trade, labor relations, and other social and economic problems that a large measure of discretion in regulating it must be restored to the states.”<sup>23</sup> Michigan courts followed this line of development, restricting picketing if its purposes or methods were unlawful.<sup>24</sup> As one commentator put it, picketing was a “legal Cinderella,” which a fairy-godmother Supreme Court allowed to be a princess only until midnight.<sup>25</sup>

Organized labor’s political power crested during World War II. The courts’ retreat from picketing-as-free-speech was part of a general postwar reaction that culminated in the Taft-Hartley Act of 1947. Picketing, even violent picketing, continued, as it had in the *Beck* years, depending on the reaction of local and federal authorities.<sup>26</sup> In states like Michigan, where organized labor and Democratic power became entrenched, and which did not use the Taft-Hartley Act’s option to become “right-to-work” states, unions did not need the weapon of picketing as much. What the *Book Tower* case revealed most was the increasing influence of federal policy on state power. Labor relations, heretofore regarded as a strictly local matter, were now profoundly influenced by Congress’s power to regulate interstate commerce. The idea that the First Amendment’s guarantee of freedom of speech could limit state regulation of civil liberties was perhaps even more important. This was part of the process known as the “incorporation” of the Bill of Rights, which had limited only the federal government until the twentieth century. Both of these developments—the nationalization of socioeconomic policy and of Bill of Rights standards—would have tremendous impact on Michigan law in the coming decades. The weakening of state power was among the most significant legacy of the New Deal.<sup>27</sup>

## FOOTNOTES

1. *Sherwood v Walker*, 66 Mich 568; 33 NW 919 (1887).
2. Pound, *Liberty of contract*, 18 Yale LJ 454 (1909). For a contrary view, see Reynolds, *The myth of labor’s inequality of bargaining power*, 12 J Lab Res 167 (1991).

3. *Commonwealth v Hunt*, 45 Mass 111 (1842).
4. Graham & Gurr, *The History of Violence in America: A Report to the National Commission on the Causes and Prevention of Violence*, rev ed (New York, 1970), p 281.
5. George, *The Condition of Labor: An Open Letter to Pope Leo XIII* (New York, 1891), p 86.
6. *Atchison, Topeka, and Santa Fe Ry v Gee*, 139 F 582, 584 (SD Iowa, 1905).
7. Cogley, *The Law of Strikes, Lockouts, and Labor Organization* (Washington: W. H. Lowdermilk, 1894), p 223.
8. *Adair v US*, 208 US 161; 28 S Ct 277; 52 L Ed 436 (1908); *Coppage v Kansas*, 236 US 1; 35 S Ct 240; 59 L Ed 441 (1915); *Truax v Corrigan*, 257 US 312; 42 S Ct 124; 66 L Ed 254 (1921).
9. The standard works critical of labor injunctions are Frankfurter & Greene, *The Labor Injunction* (New York: Macmillan, 1930) and Witte, *The Government in Labor Disputes* (New York: McGraw-Hill, 1932). The contrary case is made in Poulson, *Criminal conspiracy, injunctions, and damage suits in labor law*, 7 J Legal Hist 212 (1986), and Petro, *Injunctions in labor disputes*, 14 Wake Forest L R (1978).
10. Faue, “Methods of Mysticism” and the Industrial Order, in *The History of Michigan Law*, eds Finkelman & Herschok (Athens, OH: Ohio Univ Press, 2006), p 217.
11. *Beck v Railway Teamsters Protective Union*, 118 Mich 497, 525; 77 NW 13 (1898).
12. Cooper, *The fiction of peaceful picketing*, 35 Mich L R 75 (1936).
13. *Clarge v Lufhringer*, 202 Mich 612; 168 NW 440 (1918); Petro, *Injunctions, supra* at 462; Derifield, *Defining peaceful picketing: The Michigan Supreme Court and the labor injunction, 1900–40* (MA thesis, Western Mich Univ, 2005), pp 80–96.
14. Derifield, *Defining peaceful picketing, supra* at 8, 50, 65–73, 91; McCracken, *Strike Injunctions in the New South* (Chapel Hill: Univ of NC Press, 1931), p 143; Taylor & Witney, *U.S. Labor Relations Law: Historical Development* (Englewood Cliffs, NJ, 1992), p 94.
15. Poulson, *Criminal conspiracy, supra* at 226; Petro, *Injunctions in labor disputes, supra* at 475 and Petro, *Unions and the southern courts: Part II—Violence and injunctions in southern labor disputes*, 59 NC L R 901, 905 (1981).
16. *NLRB v Fansteel Metallurgical Corp*, 306 US 240; 59 S Ct 490; 83 L Ed 627 (1939).
17. Derifield, *Defining peaceful picketing, supra* at 96, 103–105, 111–115.
18. A fourth Republican, William W. Potter, died in 1940 and did not participate in the decision.
19. Brennan, *Nonpartisan election of judges: The Michigan case*, 40 SW LJ 23 (1986); *The Proposed Amendment to the Michigan Constitution Providing for the Appointment of Supreme Court Judges*, National Lawyers Guild Quarterly 1 (1937–38), p 319.
20. *Thornhill v Alabama*, 310 US 88; 60 S Ct 736; 84 L Ed 1093 (1940).
21. *Book Tower Garage v Local 415, United Auto Workers*, 295 Mich 580; 295 NW 320 (1940).
22. *Milk Wagon Drivers v Meadowmoor Dairies*, 312 US 387; 61 S Ct 687; 85 L Ed 903 (1941); *Decisions*, 41 Colum L R 727 (1941), regarded this decision as an “unjustifiable abridgement of freedom of expression.”
23. Kelly, Harbison, & Belz, *The American Constitution: Its Origins and Development*, 7th ed (New York: W. W. Norton, 1991), pp 524–525; Teller, *Picketing and free speech*, 56 Harv L R 180 (1942).
24. Kurtz, *Stranger picketing and its present status in Michigan*, 35 U Det LJ 517 (1957–58).
25. Price, *Picketing—A legal Cinderella*, 7 U FLA L R 143 (1954).
26. Thieblot & Haggard, *Union Violence: The Record and the Response by Courts, Legislatures, and the NLRB* (Philadelphia: Wharton School, 1983).
27. Kelly, Harbison, & Belz, *The American Constitution, supra* at 500.

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# People v Hildabridle

## Voelker and the Art of Crafting an Opinion

353 Mich 562 (1958)

The centenary of the Michigan Supreme Court saw a famous opinion by the best-known justice in its history, John D. Voelker. He was better known by his pen name, Robert Traver, and best known for his 1958 novel, *Anatomy of a Murder*, which became a Hollywood film. Voelker, a proud product and vivid chronicler of his beloved Upper Peninsula, spent only three years on the Court, but wrote some of its most memorable, and certainly most colorful and entertaining, opinions. In *People v Hildabridle*, he convinced his sharply divided colleagues to overturn the indecent exposure convictions of a group of Battle Creek nudists. The episode also indicated the awakening of postwar liberalism in the United States, and the dawn of the cultural revolution of the 1960s.

Voelker was an active Democrat, and benefited by the resurgence of the party in the New Deal era. He was the first Democrat elected to the Marquette prosecutor's office "since Noah's ark," as he put it. He was a member of the state party committee in 1939, ran in the primary election for the United States House of Representatives in 1954, and ran as a presidential elector in 1956. The liberal wing of the Democratic Party grew stronger in the postwar years, as Walter Reuther consolidated his control of the United Autoworkers and the CIO. He and August Scholle of the Michigan CIO Council became prominent players in state politics. In 1948, a coalition of labor and intellectual leaders elected G. Mennen Williams governor. Williams, known as "Soapy" because he was the heir to the Mennen Soap Company fortune, was a young (36), attractive, and personable liberal, a protégé of Frank Murphy, and held the office until 1960. The legislature, though, was controlled by Republicans, who refused to reapportion districts to reflect the increased urbanization of the state. But the Democrats were able to control most statewide offices, including the Supreme Court.<sup>1</sup> Justice Eugene F. Black, a Republican who had broken with his party and become a Democrat, lobbied earnestly for Voelker's appointment.<sup>2</sup> Late in 1956, with a vacancy on the Court to fill, Williams sent two assistants to interview Voelker about the position. When they asked him why he wanted to serve, Voelker replied, "Because I have spent my life on fiction and fishing, and I need the money."<sup>3</sup> He wouldn't need the money for long. Three days before Williams appointed him to the Court he got a contract from St. Martin's Press for *Anatomy of a Murder*.

In the meantime, the Sunshine Gardens nudist colony had been hosting families on its 140-acre campus outside of Battle



Article from July 1, 1956, *Battle Creek Enquirer*.

Author and photographer unidentified. Used by permission.

Creek since 1942. Though there had been no complaints from the community, a couple of police officers decided to investigate and raid the colony. For no apparent reason, they visited the colony on June 15, 1956, and saw what they were looking for—nudists. One of the officers used this observation to swear out a warrant for the arrest of the nudists. When he returned to serve the warrant on June 30, he observed many more campers and called in other officers to arrest them. They arrested Earl Hildabridle and several others on charges of indecent exposure, and an elderly widow justice of the peace bound them over for trial in Calhoun County Circuit Court. The nudists were convicted and sentenced to 30 days in jail, a \$250 fine plus court costs, and two years probation. They appealed to the Supreme Court.<sup>4</sup>

Voelker's appointment helped to cement the liberal majority on the Court. It also added to the Court's willingness to use judicial power vigorously. As in other state courts, a sudden influx of new personnel (four new justices joined the Court between 1954 and 1958), including strong, independent, "maverick" personalities (Justices Black and Kavanagh also had forceful reputations), and partisan conflict marked the advent of "judicial activism."<sup>5</sup> The Court had been evenly divided, with four Democrats and four

Republicans, in 1956, and one of the Democrats, Edward Sharpe, was a conservative. Governor Williams replaced Sharpe with the liberal Thomas M. Kavanagh, and Voelker replaced Republican Emerson R. Boyles.<sup>6</sup> In 1957, in an election in which the Democratic justices overtly campaigned as partisan candidates, Justice Voelker had been elected to serve out the remainder of Boyles' term.<sup>7</sup> Justice Kavanagh did not sit on the *Hildabridle* case.

The writing of majority opinions of the Court was a task assigned randomly by the Chief Justice to one of the justices among the majority. In the *Hildabridle* case, Chief Justice Dethmers was assigned to write what initially appeared to be the majority opinion upholding the convictions. When Justice Voelker circulated his dissenting opinion, however, it was so powerful that it convinced Justice George C. Edwards, Jr. to break with the Republicans and vote to overturn the convictions. As a result, in the *Michigan Reports* publication of the decision, the majority opinion begins with Voelker's original "I dissent."<sup>8</sup> Voelker insisted that the Supreme Court reporter keep this apparent anomaly in the *Reports*. "The entire posture and thrust—and perhaps most of the strength—of my opinion is that it is a dissent; that fact would still be quite apparent, though more ambiguously, even were the suggested changes made."<sup>9</sup>

The original majority opinion took a conventional view of the police power to impose the majority's moral views on dissident minorities. The three Republican justices followed the nineteenth-century rule that any speech or conduct that had a "bad tendency" could be punished. For example, in 1915 the United States Supreme Court upheld a Washington state conviction of a group of nudists, not for engaging in nudism, but for publishing a pamphlet (entitled "The Nudes and the Prudes") that was critical of the state's law against nudism.<sup>10</sup> The *Hildabridle* opinion also noted that the United States Supreme Court had recently affirmed that obscenity was not protected by the First Amendment.<sup>11</sup> In the nearest and first precedent on nudist law, *People v Ring* (1934), the Michigan Supreme Court had upheld the conviction of nudists in similar circumstance, because "Instinctive modesty, human decency and natural self-respect require that the private parts of persons be customarily kept covered in the presence of others"—i.e., that nudism per se was criminal under Michigan law.<sup>12</sup> As one commentator noted, "the Michigan Court considered whether, in its own mind this exposure would have been immoral regardless of how the people present actually felt. The judges...would have been offended themselves, so they held that the policy of the state was offended."<sup>13</sup>

The *Ring* opinion gave wide berth to police, under the traditional understanding that the police often had to engage in irregular practice to control undesirable social practices. Police exercised considerable discretion in applying the law to reflect the moral sentiments of the community. One historian observes, "They were, to say the least, 'not legalistic.'" In this view, the middle class tolerated a certain degree of loosely constrained police behavior as a kind of "delegated vigilantism" against social outcasts and undesirables. "Individual due process was routinely subordinated to the local police power necessary to secure the moral fiber and general welfare of a community."<sup>14</sup>

Voelker did not deny the legitimacy of indecent exposure laws per se. Rather, he condemned the police action in this case as an illegal search and seizure and denied that recreational nudity was indecent exposure. He noted that there was no public complaint against the nudists, whose camp was so thoroughly isolated that the police themselves had a hard time finding and entering it. "So the presumably outraged community boils itself down to a knot of determined police officers who for some undisclosed reason after fourteen years finally made up their minds and set a trap to tip over the place." The police obtained warrants by an obvious subterfuge in what Voelker ridiculed as "Operation Bootstrap." "Yet to say that the search and arrests here were illegal is an understatement," he went on. "It was indecent—indeed the one big indecency we find in this whole case: descending upon these unsuspecting souls like storm troopers.... If this search was legal then any deputized window-peeper with a ladder can spy upon any married couple in the land and forthwith photograph and arrest them for exposing themselves indecently to him." Voelker was unwilling "to burn down the house of constitutional safeguards in order to roast a few nudists."

Voelker opined that the Sunshine Gardens nudists were not engaged in indecent exposure at all, for they were only exposing themselves to like-minded nudists. To convict them would be to say that "any nudity anywhere becomes both open and indecent regardless of the circumstances and simply because some irritated or overzealous police officers may think so." He classed nudists with advocates of various other American manias and fads, which we tolerate "unless they try too strenuously to impose or inflict their queer beliefs upon those who happen to loathe these items." "Private fanaticism or even bad taste is not yet a ground for police interference. If eccentricity were a crime, then all of us were felons."

Voelker recognized the United States Supreme Court's recent decision that obscenity was not protected by the First Amendment, but denied that the Sunshine Gardens nudists were engaged in obscene behavior.<sup>15</sup> Moreover, he noted that Justices Douglas



1954 photo of Elmer and Lucille Adams, owners and operators of Sunshine Gardens Resort.



*People v Hildabridle*

and Black had entered a “blazing dissent” with which he sympathized. As for the *Ring* precedent, he dismissed it as “less a legal opinion than an exercise in moral indignation.... Moral indignation is a poor substitute for due process. The embarrassing *Ring* case is hereby nominated for oblivion.” Justice Edwards, who had been part of the unanimous *Ring* decision, entered a separate concurring opinion limited to the illegal-search element of Voelker’s decision.

A decade later, Voelker reflected that *Hildabridle* was “interesting not only on its own rather bizarre facts, but for its overtones.”

For one thing, it shows how sharply men of undoubted goodwill can differ over identical facts. For another, it shows that the law is often what men make it, and that even judges occasionally have hearts and emotions by which, contrary to popular mythology, they are sometimes ruled as much as by “The Law.” It shows how wide is the gulf that can divide judges as well as other men, and that perhaps humility and compassion and a capacity for empathy figure in it somewhere. It shows that an important public issue—whether snoopers may claim to be shocked by what they behold—can be resolved by a soberingly narrow margin.

Above all, the majority decision recognizes man’s infinite capacity for folly and reaffirms the divine right of every man to be a damned fool in his own way so long as he does not do too much to others with his queer notions. It also shows that there are still earnest souls in high places who would question the exercise of that right by their nonconforming fellows. Finally, the case shows that the battle for tolerance is eternal.<sup>16</sup>

Most of all, for this literary justice, the case made a good story, and “every legal case that ever happened is essentially a story, the story of aroused, pulsing, actual people fighting each other or the state over *something*: for money, for property, for power, pride, honor, love, freedom, even for life—and quite often, one suspects, for the pure unholy joy of fighting.” It reinforced Voelker’s belief that the law, however imperfect it might be, is the only alternative to anarchy or despotism.<sup>17</sup>

Though Voelker thought of himself as a “fighting liberal,” and compiled a record of moving the Court in a liberal direction, he had also been an effective prosecutor, and usually did not vote to expand the rights of criminal defendants.<sup>18</sup> But the police methods in this case were so high-handed as to arouse his indignation. He was also at pains to point out that he had no particular sympathy for nudism. “Lest I henceforth be heralded as the patron saint of nudism (which I probably will be anyway), I hasten to preface what follows by stating that I am not a disciple of the cult of

nudism,” he wrote. “Its presumed enchantments totally elude me. The prospect of displaying my unveiled person before others, or beholding others thus displayed, revolts and horrifies me.”<sup>19</sup> Yet, one cannot help suspecting that he did appreciate the independence of the nudists, that they displayed (as it were) the free-spirited ethos of *Danny and the Boys*. Voelker’s life and writing were marked by a Romantic-naturalist love for unique characters, people who resisted the homogeneity of postwar America, the conformity of modern, mass, urban-industrial culture.

Both Voelker and the Sunshine Gardens nudists denied that nudism had anything to do with sex. It may have been coincidental, but *Hildabridle* came down on the eve of the American sexual revolution. Voelker himself had conventional views about sexual conduct. Characteristically, he blamed city life for the increased incidence of sexual disorder in the twentieth century, and noted in 1943 “the general relaxation in public morals itself, a sloughing off of old inhibitions.”<sup>20</sup> In the 1960s, the law would rapidly lose its power to enforce old sexual mores. Courts would lead the way in limiting the kind of censorious cultural control that the dissenters in *Hildabridle* were still willing to accept. Of greatest importance in this transformation was the United States Supreme Court’s increasing “incorporation” of the Bill of Rights. It established a permissive national standard that prevented states and localities from enforcing traditional strictures with regard to obscenity, pornography, contraception, and eventually abortion and homosexual conduct. At the same time, it expanded the rights of criminal defendants to inhibit arbitrary police enforcement of remaining laws.<sup>21</sup>

Voelker largely retreated from the political and cultural conflicts of the coming generation. *Anatomy of a Murder* enabled him to spend the rest of his life writing and fishing in the Upper Peninsula. While his Supreme Court salary was \$18,500 a year (\$117,000 in 2005 dollars), his royalties from *Anatomy* were almost \$100,000 a year. He won election for a full eight-year term in 1959, but quickly resigned, telling Governor Williams that “Other people can write my opinions, but none can write my books.”<sup>22</sup> He waited until the new year to resign, which allowed the governor to appoint his successor, Theodore Souris. Some observers saw this as a cheap political trick to keep the Supreme Court in Democratic hands, since incumbents appointed by the governor nearly always kept their seats in subsequent elections.<sup>23</sup> “If he wanted to write the book-of-the-month, what did he run for?” asked Charles R. Feenstra, a Republican legislator from Grand Rapids. Voelker replied with a fiery denunciation of Feenstra as the type of reactionary who was responsible for all that was wrong in Michigan.<sup>24</sup>

Voelker had helped to cement a liberal majority on the Michigan Supreme Court, acting “not as a maverick or a political independent but rather a critical player in a well-disciplined, thin, liberal Democratic majority.”<sup>25</sup> He had worked with Justice Black to improve the quality of the Michigan judiciary, which they regarded as overworked and underpaid. “As a rule the Supreme Court during the past twenty years has consisted principally of worn-out political hacks and third-rate lawyers,” he wrote in 1958.<sup>26</sup> He told Governor Williams that he had wanted “to do my part to lead our court into the twentieth century. That...task, while certainly not



Headline from April 17, 1958, *Battle Creek Enquirer* by paper’s State Bureau. Used by permission.



complete, is now fortunately well on the way to becoming a reality. At least our court is no longer last man on the judicial totem pole." Voelker confessed that his political liberalism also made the Court an uncomfortable place for him. "I chafe under the imposed detachment and restrictions of sitting on a so-called nonpartisan court."<sup>27</sup> Like his reaction to the criticism of his resignation, his comments about his political zeal suggested that Voelker lacked a "judicial temperament." In this, he resembled Justice William O. Douglas, whom he admired personally (and resembled physically) and whose dissent in the *Roth* case he used in his *Hildabridle* "dissent."<sup>28</sup>

One statistical study by a political scientist noted that Voelker was the second-most influential member of his Court.<sup>29</sup> Labor unions and civil plaintiffs were the principal beneficiaries; later civil libertarians more generally would come to view the courts as their chief allies. His tenure seems to have sharpened his political views. "Politics was so exciting back then," Voelker told an interviewer in 1990. "I was...maturing."<sup>30</sup> He wrote the preface to Williams' 1960 campaign biography.<sup>31</sup> This came out in his next, overtly political novel, *Hornstein's Boy*, about the ordeal of a committed liberal senatorial candidate, and in *Laughing Whitefish*, concerned with justice for the Native American inhabitants of the Upper Peninsula. This was Voelker's particular cause; after his death in 1991, the John D. Voelker Foundation established a scholarship fund for Native Americans to attend law school.

But for all his commitment to emerging American liberalism and the Democratic Party in Michigan, Voelker will likely be most remembered for his commitment to individualism. "I learned in a rush, one of the stark and bitter lessons of human existence," he wrote in *Laughing Whitefish*. "With terrible clarity I learned that all the places that I would ever see and the books that I would ever read, the music that I would ever listen to, the people I would ever love, that all would one day disappear, leaving nothing behind, nothing at all. If this gave me resignation and humility, I hoped it gave me a kind of daring, a daring to live to the hilt one's little span." He similarly told a friend, "You are a success in life if you've had as much fun along the way as possible, and hurt as few people as possible."<sup>32</sup> This was an individualism at once traditional, part of Michigan's frontier history and well placed in the forests and streams of the Upper Peninsula wilderness, and also modern and existential.

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# In re Huff

## Judicial Power and Democracy (I)

352 Mich 402 (1958)

The rising tide of post-New Deal liberalism in both Washington and Michigan had profound constitutional and political effects. In the late 1950s and early 1960s, the United States Supreme Court and the Michigan Supreme Court made bold assertions of judicial power in their constitutional systems. They also used that power to expand egalitarian principles, most significantly by ordering the imposition of a “one person, one vote” standard in legislative apportionment.

In the mid-1950s, demands by African Americans for equality began to have a major impact in national politics. The United States Supreme Court, under Earl Warren, gave the issue great prominence when it held that public school segregation violated the Constitution in the 1954 case of *Brown v Board of Education*.<sup>1</sup> Though initially there was tremendous resistance to, and very little compliance with, the decision, by the mid-1960s its legitimacy had been established, and it came to be seen as a major step in the civil rights movement. The Warren Court subsequently used judicial review to effect profound changes in American politics and society. It prohibited school prayer and generally limited religious expression in public life,<sup>2</sup> nearly prohibited capital punishment,<sup>3</sup> and dismantled much of the policing of morals in areas like obscenity, pornography, contraception, and abortion.<sup>4</sup> It also imposed national standards in criminal procedure through the nearly complete “incorporation” of the Bill of Rights. The United States Supreme Court contributed to a trend that imposed modern, national standards over those of provincial—usually southern white and northern ethnic urban—values. In doing so, it had a powerful impact on American politics and drove results outside the usual political process.<sup>5</sup>

Many state supreme courts followed a similar path.<sup>6</sup> A dramatic confrontation between a Michigan circuit court judge and the state Supreme Court showed a centralization within states as well as among the United States. Circuit courts had been the basic trial courts throughout Michigan’s history—indeed, before there was a permanent Supreme Court the circuit court judges constituted a supreme court. The state was divided into 41 judicial circuits. In some rural circuits, one judge sat for several counties; in the urban circuits, several judges sat



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for one county—Wayne County, for example, had 18 judges. The circuit court judges were elected for six-year terms, and the legislature established new courts as needed.<sup>7</sup>

The Saginaw County circuit had had two judges since 1888, and by the 1950s appeared to need a third. The Republican legislature, however, was reluctant to create a new judgeship, because the Democratic governor, G. Mennen Williams, would likely appoint a judge from his party’s ranks, and the judge’s incumbency would be a great advantage when the first election for the post was held. As with the Michigan Supreme Court, though the office was elective, temporary appointments were often more important than elections. To facilitate the creation of a third judgeship, the governor finally agreed to appoint a Republican probate judge to the circuit judgeship and a Democratic judge to fill the probate vacancy.<sup>8</sup>

Others, members of the bar and bench—lawyers and judges familiar with the court—believed that the Saginaw circuit didn’t need an additional judge, but rather needed more efficient judges. They noted that the caseload in Saginaw was well below the state average, and the Supreme Court noted the “dilatatory tactics of a few lawyers” in the circuit.<sup>9</sup> State court administrator Meredith Doyle persuaded the Supreme Court to order Presiding Judge Eugene Snow Huff of the Saginaw circuit to move temporarily to the very busy Wayne County circuit, and to bring in Timothy Quinn from a neighboring circuit to clean up Judge Huff’s backlog of cases in Saginaw. This presented a personal and cultural clash. Where Huff was regarded as mild and gentlemanly, conducting his court in a leisurely and humane fashion, Quinn was reputedly a “martinet,” who administered a court with ruthless, “assembly-line” efficiency. Indeed, Quinn immediately announced a new set of court procedures to speed up business. This provoked a protest from the Saginaw County Bar Association, led by Robert J. Curry.



Judge Timothy Quinn was assigned to Huff’s courtroom.

The bar association asserted that the voters who had elected Judge Huff had a right to his service, and denounced the “mania for speed” that had turned much of Michigan into “the quick justice state.”<sup>10</sup>

Although he initially agreed to accept his reassignment, the protest convinced Huff to defy the order and remain in his court. On May 12, 1958, when Judge Quinn appeared to take his place, Huff refused to step aside. Emphasizing the humane qualities that had endeared him to his constituents, he declared, “I have tried to lead a Christian way of life, living in harmony with the people of Saginaw. If a judge must be mean, inconsiderate, unmindful of the inconvenience of others, callous to the suffering and misfortunes which bring men and women before the court, I am not the man to serve you.” Quinn warned Huff that he was defying orders of the Supreme Court, and had an explicit order from the Court served on Huff later that day.<sup>11</sup>

The next day, Judge Quinn ordered the court clerk, Frank Warnemunde, to remove the court’s files from Huff’s court to a room in which Quinn was setting up court. Curry urged Warnemunde not to do it, employing a revealing analogy: “You know, Frank, at another time in history, when Robert E. Lee was faced with a similar choice as you, he stuck with his people!”<sup>12</sup> Curry painted the conflict as between genteel manners and modern efficiency, between Saginaw and Lansing, and likened it to that between the Confederacy and the Union, at a time when white southerners were again engaged in “massive resistance” against the United States Supreme Court’s order to desegregate their schools. The governor of Arkansas, Orval Faubus, had defied what he regarded as an unconstitutional decision and refused to allow black students admission to Central High School in Little Rock. President Eisenhower had sent in the National Guard to enforce the order, and the case was being litigated at the same time as the Huff standoff.

On May 16, responding to an order to show cause why he should not be cited for contempt of court, Huff appeared before the Michigan Supreme Court. Chief Justice Dethmers admitted that there had been “division of this court before the order entered”—apparently Justices Edwards and T. M. Kavanagh had not wanted to order Huff to move to Wayne County—but the Court was unanimous in defending its power to do so.<sup>13</sup> The hearing was tense and dramatic. The justices pleaded with Huff to comply. “This Court is even now patient and indulgent,” Dethmers said, “Will you still persist?” Huff remained steadfast, and his lawyer, Robert Curry, stood defiant. Using images and rhetoric reminiscent of William Jennings Bryan, he warned, “All the water that has flowed since Pontius Pilate put his hands in the bowl will not wash out the stain of what you do today.”<sup>14</sup> The Court had no choice but to find Huff guilty of contempt, fining him \$250.

Chief Justice Dethmers wrote an extensive opinion for a unanimous Court in this unprecedented

case. Echoing the Declaration of Independence, Dethmers noted that “A proper regard for understanding by the bench and bar and the public generally of the authority under which this Court moved and the reasons which impelled it to do so requires their announcement through formal opinion.”<sup>15</sup> The Michigan Constitution stated that “The Supreme Court shall have a general superintending control over all inferior courts.”<sup>16</sup> Several legislative acts, like the 1952 Court Administrator Act, had provided specific powers to manage the circuit courts, including the creation of the office of court administrator, with the specific power to transfer circuit judges. “It does not comport with our system of administration of justice that an inferior court shall review the determinations of this Court,” Dethmers wrote. “Even though the propriety or validity of our order be questioned, it should be obeyed until this Court has vacated it.”<sup>17</sup> The Court also defended its power to enforce these orders through contempt citations. Summary punishment for contempt was “inherent and a part of the judicial power of constitutional courts, cannot be limited or taken away by act of the Legislature nor is it dependent on legislative provision for its validity or procedures to effectuate it.”<sup>18</sup>

The wounds from the altercation seem to have healed quickly. Judge Huff soon decided to comply with the order to go to Wayne County, paid his fine, won four more six-year terms in the Saginaw Circuit, and retired in 1980. Judge Quinn was later elected to the newly created Michigan Court of Appeals. Justice Dethmers smoothed ruffled feathers by saying that the Supreme Court planned “no tyrannical control of the courts.”<sup>19</sup> The Michigan Supreme Court had established its supremacy in the state judicial system.

The new constitution of 1963 confirmed and augmented this power. The shift in wording was subtle but significant. Whereas the 1908 constitution stated that “the judicial power shall be vested in one Supreme Court, circuit courts, probate courts, justices of the peace and such other courts...as the Legislature may establish,” the

In *Cooper v Aaron* [358 U.S. 1 (1958)], which came in the wake of *Brown v The Board of Education of Topeka* [347 U.S. 483 (1954)], the United States Supreme Court ruled that states are bound by the Court’s decisions and cannot choose to ignore them. Shortly after the *Brown* decision, the Little Rock, Arkansas school district began planning to implement desegregation. Other Arkansas districts, however, opposed segregation and began looking for ways to get around the ruling. The Arkansas State Legislature responded by amending the state constitution in a way that discouraged desegregation and allowed white children to choose not to attend desegregated schools. At issue in *Cooper* was whether, under constitutional law, Arkansas officials were bound by the Court’s prior decision in *Brown*, or if, instead, they were entitled to resist a Supreme Court order to desegregate schools. Relying on the reasoning that the United States Supreme Court is the “supreme law of the land,” the Court ruled that Arkansas officials were bound by the *Brown* decision.<sup>1</sup> Though *Cooper* played out on the federal level, the principles in the case were similar to the principles at issue in *Huff*. Since the 1908 Michigan Constitution stated that “The Supreme Court shall have a general superintending control over all inferior courts,” the Michigan Supreme Court ruled that lower courts were constitutionally bound to abide by orders it issued.

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new constitution provided that “the judicial power of the state is vested exclusively in *one court of justice* which shall be divided” along similar lines. It abolished the antiquated system of fee-paid justices of the peace, permitted the legislature to create new district courts to try minor offenses and small claims, and, most significantly, created a new court of appeals. Heretofore the Supreme Court had been the only court of appeals, and the justices were overwhelmed by the volume of cases brought to it. Now the Supreme Court would have greater control over its docket, and could concentrate on the most significant cases. As a result, its size was reduced from eight to seven justices. The new constitution generally promoted modernization and efficiency in state government, precisely the values that Huff resisted and the Court vindicated. But, if there was any doubt about the matter, it did provide that “the Supreme Court shall not have the power to remove a judge.”<sup>20</sup>

The Michigan Supreme Court also made a strong statement of the “inherent powers” doctrine—that courts can command resources needed for their operations, usually by issuing orders to state fiscal authorities. In 1968, the judges of the Wayne County Circuit Court sued the Board of County Commissioners (in their own court) to compel the Board to hire more personnel for clerical support. The case was moved to the Oakland County Circuit Court, and the judges prevailed—including a formal order compelling the county to pay for the lawyers that the judges retained to bring the suit. The Supreme Court, after attempting a compromise settlement, affirmed the judgment in 1971.<sup>21</sup> On the same day, the Supreme Court held that a judicial district was not bound by a collective bargaining agreement that the county had negotiated with its employees.<sup>22</sup> These decisions actually limited the inherent-powers doctrine and empowered the state court administrator, but they also effectively asserted judicial independence and the central control of the judiciary by the state Supreme Court. Constitutions and legislatures could control the effects of judicial abuse of the inherent-powers principle, and voters could check the abuse of this power by elected judges. In fact, one Alpena County judge lost his seat through the electoral process after making an inherent-powers assertion.<sup>23</sup>

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## THE VERDICT OF HISTORY

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# Scholle v Hare

## Judicial Power and Democracy (II)

367 Mich 176 (1962)

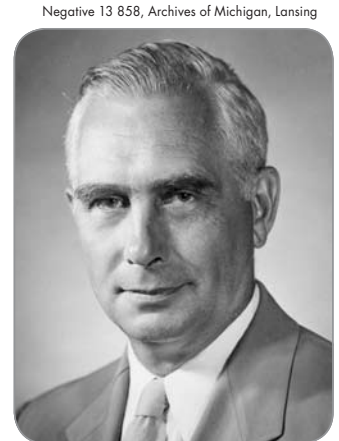
Part from racial equality, the most prominent issue of liberal reform in the 1950s–1960s was legislative reapportionment. Legislative bodies have always been slow to reapportion representation to keep up with shifts in population. The English Parliament, before the 1832 Reform Act, was dominated by “rotten boroughs” or “pocket boroughs,” old districts that had lost population but still sent members to the legislature while the new towns and cities went unrepresented. The most infamous boroughs were “Old Sarum,” which had 15 voters, and Dunwich, most of the land of which had eroded into the sea, but whose 32 voters chose two members of Parliament. At the same time, Manchester, a new city of about 60,000, chose none.

In the American colonies, the early, seaboard-dominated legislatures met protests from backcountry settlers to whom they grudgingly extended seats; in the twentieth century, city dwellers demanded proportional representation from rural-dominated legislatures. The disproportion was usually worse in the upper houses of state legislatures that often, like the United States Congress, adopted a “federal” scheme in which counties were represented. States also drew congressional district lines in unequal fashion. The extent of the problem was expressed in “variance ratios”—the difference between populations among districts. Vermont, for example, gave each town a seat in its senate regardless of population, and the most populous town in the state had 1,000 times the number of people as the least populous town. In the United States Senate, where each state elects two senators regardless of population, the variance ratio between California (35 million) and Wyoming (500,000) is 70:1. It is worth noting that Article V of the United States Constitution provides that no amendment can deprive a state of equal suffrage in the Senate without its consent, making this disproportion virtually eternal.

The political impact of malapportionment in Michigan in the 1950s was to increase the power of rural, and at this point, predominantly Republican and conservative voters, at the expense of urban, usually Democratic and liberal, voters. Often state legislatures flouted provisions in their own constitutions for periodic reapportionment. In 1960, 36 state constitutions required such redistricting, but 24 legislative houses had not been reapportioned for over 30 years.<sup>1</sup> Michigan reapportioned its legislature in 1952, but still permitted variance ratios of 2:1 in the House of Representatives and 10:1 in the Senate. A majority of the state’s voters approved a referendum (Proposition 3) that year that explicitly allowed Senate districts to be based on geographical area rather



Secretary of State  
James M. Hare



August Scholle

than population. At the same time, by an even wider margin, the voters rejected an amendment to require population-based representation in both houses of the legislature. A majority of the state seemed content to allow something other than simple majority rule in the upper house. In the Michigan Senate, the 12 Democratic state senators had been elected by 46,000 more votes than the 22 Republican senators. Democratic state representatives had won over twice as many votes as the Republican representatives, but the House was tied, 55-55.<sup>2</sup>

These systems had been repeatedly challenged in state and federal courts, without success. In 1946, the United States Supreme Court refused to declare that legislative malapportionment was a denial of the Fourteenth Amendment’s guarantee that no state shall deprive any person of the equal protection of the laws. “Courts ought not to enter this political thicket,” Justice Felix Frankfurter said, holding that the issue was a non-justiciable “political question.”<sup>3</sup> In Michigan, the campaign to have the state Supreme Court hold that the Michigan Constitution’s allowance of unequal apportionment violated the Fourteenth Amendment was led by Gus Scholle, president of the state AFL-CIO and long-time power in Michigan and national Democratic politics. As one historian notes, “From 1948 through 1968 Democratic presidential campaigns would start with the nominee speaking to large union rallies on Labor Day in Detroit’s Cadillac Square.”<sup>4</sup> In Michigan, “Clear it with Gus” was standard practice in the Democratic party.<sup>5</sup> The American Civil Liberties Union and Americans for Democratic Action, two other prominent liberal interest groups, joined organized labor in the litigation. They were confident that a majority of the Michigan Supreme Court would be sympathetic to their case.<sup>6</sup>

The Court rejected Scholle's appeal for an order to the secretary of state to withhold writs of election for the Michigan Senate. Two Democratic justices joined the three Republicans in upholding Proposition 3's provision for unequal senate districts. Justice George C. Edwards, Jr., wrote the principal majority opinion. Edwards had been a member of the law firm representing Scholle, and his decision against his former partners "ended up giving me all sorts of headaches," he later recalled.<sup>7</sup> Edwards devoted most of his opinion to showing the vast number of states that allowed representation based on factors other than population and which had ratified the Fourteenth Amendment, thus recounting that it was not their intent to impose proportional representation. "This Court does not determine the wisdom of the decisions made by the people of Michigan in adopting their constitution," he said. "By its terms, all political power is inherent in them, subject only, of course, to the United States Constitution." And the United States Supreme Court, the final arbiter of the meaning of the Constitution, did not hold unequal electoral districts to violate the Fourteenth Amendment. Edwards made it clear that he was not voting his political sympathies. "These are cold words with which to greet a plea for equality of voting rights which has at least a kinship with the Declaration of Independence," he concluded, and expressed hope that the future would change the law. "Nor do we believe that the final chapter has been written in the struggle between those who would fully embrace the principle of equality of man and those who would hold it in check."<sup>8</sup>

Justice Eugene F. Black wrote a concurring opinion based on the "paradoxical" fact that Scholle had a constitutional right, but no constitutional remedy. This arose from the United States Supreme Court's "political questions" doctrine: some constitutional rights were not justiciable, but depended on the political branches for their vindication. But Black believed that this doctrine would not long prevail. "Some day, inevitably, the [United States] Supreme Court will

authorize justiciable employment of the equality clause in cases of present political nature. But that day has not yet arrived."<sup>9</sup>

Justice Thomas M. Kavanagh, the "hard-driving, politically astute" Democrat known as "Thomas the Mighty" to distinguish him from Justice Thomas G. Kavanagh when the latter joined the Court in 1969, wrote a lengthy dissenting opinion.<sup>10</sup> He held Proposition 3 to be a violation of the Fourteenth Amendment. Kavanagh wrote, "I have searched in vain...for any reasonable or rational classification or criterion upon which [it] could be upheld."<sup>11</sup> "The only designations that can be given [it] are palpably arbitrary, discriminatory, and unreasonable, and as such it is class legislation which deprives [Scholle] and other citizens of Michigan of their rights in violation of the Fourteenth Amendment."<sup>12</sup> Democratic Justices Smith and Souris joined his dissenting opinion.

The decision produced an ugly political fallout. Justice Souris later recalled that Edwards "caught holy unshirted hell from his former colleagues in the UAW for it."<sup>13</sup> He attended the UAW convention on the day that the decision was announced, and Scholle, who was a close friend, treated him very badly, particularly for not informing him in advance of the decision.<sup>14</sup> "It was an unhappy period," Edwards said. "I think it probably strained more relationships than anything else in my judicial career. But I voted my conscience, and what the hell, I've got to live with it. I don't sleep with anything except my wife and my conscience."<sup>15</sup>

Scholle appealed the decision to the United States Supreme Court. And those who predicted that the Court would revisit its apportionment jurisprudence were soon vindicated. In March 1962 the Court announced its decision in *Baker v Carr*, a challenge to Tennessee's legislature, that apportionment was a justiciable question.<sup>16</sup> However, the Court did not specify any standards by which legislatures could comply with the equal protection standard. Thus in April it returned Scholle's case to the Michigan Supreme Court "for further consideration in the light of *Baker v Carr*."<sup>17</sup>

*Baker v Carr* produced a ferocious reaction in statehouses across the country as well as in Congress. Intense partisan passion was aggravated by the mystery of what the United States Supreme Court now required; many believed that upper legislative houses might still be apportioned on some basis other than strictly population. Some Michigan legislators even threatened to impeach the justices of the state Supreme Court if they should hold the senate apportionment unconstitutional.<sup>18</sup> This only added to the rancor of an already narrowly divided Supreme Court. By 1962, Justice Edwards, the author of the first *Scholle* decision, had resigned to become Detroit police commissioner. His replacement, Paul L. Adams, was a Democrat. Adams had been attorney general during the first round of litigation, and so did not take part in the decision. He subsequently lost the 1962 election to a Republican. Otis Smith had replaced Talbot Smith. Smith was the first African American to serve on the Michigan Supreme Court, and the second African American to serve on any state supreme court in all of American history. The second *Scholle* case was a perfectly partisan, 4-3 decision.

Justice T. M. Kavanagh began his opinion with a forceful statement of judicial independence, in words that appear to have been written by the equally proud Justice Black. "Each unmanageable

## Legislature Stands By To Thwart an Attack

HARDLY HAD the Michigan Senate ousted State AFL-CIO President August Scholle from the Conservation Commission when Attorney General Frank J. Kelley discerned that he had been all wrong about upholding the legality of the Senate's apportionment formula.

Up to that time he had been disposed to defend it, whereas Mr. Scholle not only disagreed with it, but had a lawsuit before the State Supreme Court which seeks a ruling in support of his view that the system is illegal.

According to Mr. Kelley, he was forced to change his mind by the United States Supreme Court's decision requiring Tennessee to rectify its legislative apportionment, and also by other recent decisions in lower Fed-



Kelley

U.S. Constitution's 14th Amendment, which he says Michigan is defying in its Senate apportionment. The relationship is so attenuated that anybody's guess is as good as Mr. Kelley's as to whether there really is one.

What isn't attenuated, if the U.S. Constitution is to be dragged into the debate, is its provision that the U.S. Senate shall NOT be chosen on a population basis.

We would suppose that the U.S. Constitution thus would not frown at a state which chose Senators upon other than a population basis—to wit, Michigan.

Returning to the coincidence of Mr. Scholle's treatment by the Michigan Senate and Mr. Kelley's reversed view on Senate apportionment, it has to be a matter of opinion whether there was a connection. Our opinion is that there was.

Not that Mr. Scholle necessarily got Gov. Swainson on the telephone and told him to let his Attorney General in on

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Interestingly, the legislature's threat of impeachment was addressed by the justices in the opinion and its endnotes 1 and 2. The introductory paragraph of the opinion, written by Justice Thomas M. Kavanagh, begins:

*As we approach determination of the merits, following vacation by the supreme court (Scholle v Secretary of State, 369 US 429 [82 S Ct 910, 8 L ed 2d 1]), of the judgment entered here June 6, 1960 (360 Mich 1), each unmanageable member of the Court faces an arrogant and amply headlined threat of impeachment "if the senate districts are declared illegal."<sup>1</sup> This threat should neither hasten nor slow the judicial process.<sup>2</sup>*

Endnote 1 simply contains a citation of the headline that appeared on the front page of the *Detroit Free Press* on Friday, June 29, 1962: "Threaten to Impeach Top Court."

Endnote 2 compares the legislature's threat to a past situation faced by the United States Supreme Court. Endnote 2 reads:

*Today's effort to intimidate the Court finds its historic counterpart when, in Marshall's time, a "seethingly hostile" congress "closed down the supreme court for a year." That challenge of judicial independence, and the way it was handled ultimately by the Marshall court, is chronicled in Rodell's "Nine Men," pp 85-90 (Random House, New York 1955).*

By responding clearly and directly to the legislature's threat, the justices of the Michigan Supreme Court asserted and defended their judicial independence.

member of the Court faces an arrogant and amply headlined threat of impeachment 'if the senate districts are declared illegal,'" he said, referring to a *Detroit Free Press* story.<sup>19</sup> He continued, "Only an ignorant, a corrupt, or a dependent judge would cringe and pause before any such formidable threat." Kavanagh went on to reiterate what had been his dissenting opinion two years earlier. He permitted the current Michigan Senate to continue as a "de facto" body until the end of the year, whose principal task would be to draw new, equally proportioned Senate districts. If they failed to do so within a month, the Supreme Court would order an at-large election for the fall.<sup>20</sup>

Justice Souris concurred, writing that the 1952 Senate districting "was made without any discernible or conceivable basis, let alone upon any rational basis."<sup>21</sup> Justice Black wrote a separate concurring opinion, defending the Court against charges of "judicial activism." Rather, it was the failure of previous legislatures and courts to do their duty that forced this decision. "A liberal dose of activist catharsis will do Michigan's judicial process no harm and, in this instance, may provide for our state a healthy new start," he wrote. "I prefer 'judicial activism' over 'judicial obstructivism.'"<sup>22</sup> The Court's new member, Justice Smith, also concurred. "I said to myself in almost these exact words," he later recalled, "'When in doubt, vote with the people,' and I was in doubt, and I voted with the people, and all hell broke loose."<sup>23</sup>

Justice Carr dissented, emphasizing that the voters had explicitly approved the mixed area-and-population basis for Senate apportionment in 1952, whereas Tennessee, the state under review in *Baker v Carr*, did not give its voters a similar opportunity to approve unequal apportionment. "In the view of the record of the Michigan Legislature there would seem to be no basis for any possible argument that the State of Michigan has suffered, or that

any segment of its population has been prejudiced," Carr stated, and therefore, he claimed, no violation of equal protection had occurred.<sup>24</sup> He denied that the 1952 amendment was irrational, having "the proper purpose of protecting the rights of the people in the more sparsely settled sections" of the state.<sup>25</sup> He also averred that the majority's decision meant that Michigan had no valid Senate, and therefore no legislature. In Carr's view, the majority had declared itself capable of creating legislatures "by fiat."<sup>26</sup> The two other Republican justices, Dethmers and Harry Kelly, agreed with this dissent, but added their own opinions. Eventually, the eight Michigan reapportionment cases produced 39 separate opinions.<sup>27</sup>

The secretary of state scrambled to obtain an order from the United States Supreme Court to stay the state Supreme Court order. With the Court in summer recess, he tracked down Justice Potter Stewart at his New Hampshire vacation house and prevailed; the 1962 elections were conducted under the old system. "Stewart's stay...

probably saved my political hide," Justice Smith later reflected, removing the issue from his election campaign.<sup>28</sup>

In the meantime, the Michigan Constitutional Convention revamped the legislature's apportionment system.<sup>29</sup> The 1963 Constitution, ratified by only 7,000 votes in the statewide election, still allowed considerations of area, rather than strict population, in the Senate. (This was largely due to the fact that Republicans dominated the convention, whose delegates were chosen partly according to the unequal Senate districts.) It also established a bipartisan commission to settle the issue, with final resort to the Supreme Court if the commission should deadlock, as it did.<sup>30</sup> Scholle again sued to overturn the 1963 constitution's mixed scheme.<sup>31</sup> In Washington, the United States Supreme Court at last made clear what standard it expected under *Baker v Carr*. In several decisions in 1963 and 1964, the Court established that both legislative houses must be apportioned according to a "one-person, one-vote" formula.<sup>32</sup> Despite the dissent of Justice John Marshall Harlan that the decisions "fly in the face of history," the Court continued to require legislative districting on the basis of

Chief Justice Earl Warren later called the reapportionment cases the most important of his tenure. Despite their less-than-anticipated political effect, they did usher in a new era of bold judicial activism—the so-called "second Warren Court," when Arthur J. Goldberg became the fifth reliable liberal on the bench. Goldberg replaced Felix Frankfurter, whose judicial restraint had kept the Court out of the "political thicket" of apportionment, and whom *Baker v Carr* was said to have driven to his grave.<sup>1</sup>

1. Powe, *The Warren Court and American Politics* (Harvard Univ Press, 2000), p 212.

precise mathematical equality.<sup>33</sup> The House of Representatives went so far as to pass a bill allowing upper houses of state legislatures to be apportioned on bases other than population, and removed jurisdiction from the Supreme Court to hear appeals in such cases. In a wonderful stroke of irony, liberals filibustered it in the Senate, resorting to a minority-rule tactic that they had long lamented, in the only legislative body in the country that was permanently malapportioned.<sup>34</sup>

Thus Scholle, who initially lost his suit in federal district court, was vindicated by the United States Supreme Court. The Michigan Supreme Court, which initially ordered a Republican apportionment plan, imposed a one-person, one-vote system for the 1964 elections.<sup>35</sup> Michigan ended up with the most mathematically equal legislature in the country—the one with the smallest “variance ratio.”<sup>36</sup> In what was a landslide year for Democrats across the country, the party won control of both houses of the Michigan legislature for the first time since the 1930s, although Republican George Romney was reelected governor. Moreover, reapportionment did not secure liberal Democratic fortunes for very long, as the Republicans came back and won both houses in 1966 (the House was initially tied, but two Democrats died shortly after the election). Indeed, the impact of one-person, one-vote disappointed liberals across the country; the principal beneficiaries turned out to be moderate-to-conservative Republicans in the growing suburbs.<sup>37</sup> Nor did it end disputes over legislative apportionment. Soon complaints about partisan gerrymandering arose, as Michigan Republicans claimed that Democrats drew district lines to maximize the number of Democrats elected. Later, civil rights laws would add the problem of “racial gerrymandering” to the dockets.<sup>38</sup>

The desegregation and apportionment cases in Washington, and *Huff* and *Scholle* in Michigan, showed a powerful centralization of government power within and among the states. National standards were imposed on the states, and state standards were imposed on localities, with the judiciary playing a particularly strong role in this process.

The most significant aspect of the reapportionment cases was not the substantive effect of equalizing voting power. It was the abandonment of the “political questions” doctrine, an important limitation on the judiciary’s power. In like manner, in the 1960s judges liberalized access to courts, allowed class-action suits, and swept away old principles, like “ripeness”—that a controversy needed to be sufficiently concrete to be litigated. Federal and state courts became intimately involved in all sorts of issues that had previously been left to legislative bodies, such as the administration of schools, prisons, and asylums.<sup>39</sup> Rather than hailed for striking a blow for democracy, courts often found themselves accused of usurping democratic power and imposing their own policy preferences on the people. The courts increasingly became the forum of wide-ranging political, social, and cultural contention in the last third of the twentieth century.

## FOOTNOTES

1. Kelly, Harbison, & Belz, *The American Constitution: Its Origins and Development*, 7th ed (New York: Norton, 1991), pp 614–619.
2. Dunbar & May, *Michigan: A History of the Wolverine State*, 3d ed (Grand Rapids: Eerdmans, 1995), pp 549–550; Adams, *Anticipated problems in legislative reapportionment: The Scholle decision*, 38 U Det LJ 234, 234–242 (1961).
3. *Colegrove v Green*, 328 US 549, 556; 66 S Ct 1198; 90 L Ed 1432 (1946).
4. Hamby, *High Tide: Roosevelt, Truman, and the Democratic Party, 1932–52*, in *The Achievement of American Liberalism: The New Deal and Its Legacies*, ed Chafe (New York: Columbia Univ), p 39.
5. *August Scholle, Labor Leader*, 67 New York Times, February 17, 1972, p 40.
6. Sachs, *Scholle v Hare—The beginnings of ‘one person—one vote’*, 33 Wayne L R 1609 (1987). This article is a very valuable memoir by Scholle’s attorney in the litigation.
7. *Id.* at 1614; Interview with Roger F. Lane, December 3–4, 1990.
8. *Scholle v Secretary of State*, 360 Mich 1, 37, 39; 104 NW2d 63 (1960).
9. *Id.* at 49, 113.
10. *Michigan Supreme Court Historical Society Reference Guide* (Lansing: Michigan Supreme Court Historical Society, 1998), p 175, 187.
11. *Scholle v Secretary of State*, *supra* at 83.
12. *Id.* at 126.
13. Interview with Roger F. Lane, November 5, 1990.
14. *Id.*
15. Interview with Roger F. Lane, December 3–4, 1990.
16. *Baker v Carr*, 369 US 186; 82 S Ct 691; 7 L Ed 2d 663 (1962).
17. *Scholle v Hare*, 369 US 429; 82 S Ct 910; 8 L Ed 2d 1 (1962); Lewis, *High Court Bids Michigan Review Its Apportioning*, New York Times, April 23, 1962, p 1.
18. Cohn, *A footnote to a footnote*, 75 Mich B J 495 (1996).
19. *Scholle v Secretary of State*, 367 Mich 176, 180; 116 NW2d 350 (1962).
20. Cohn, *Footnote, supra*; *Scholle v Secretary of State, supra* at 181; *Michigan Is Told to Remap Senate*, New York Times, July 19, 1962, p 14.
21. *Scholle v Secretary of State, supra* at 243.
22. *Id.* at 255.
23. Interview with Roger F. Lane, October 25, 1990; Smith & Stolberg, *Looking Beyond Race: The Life of Otis Milton Smith* (Detroit: Wayne State Univ Press, 2000), p 158.
24. *Scholle v Secretary of State, supra* at 195.
25. *Id.* at 199.
26. *Id.* at 201, 207.
27. Barber, *Partisan values in the lower courts: Reapportionment in Ohio and Michigan*, 20 Case W Res L R 416 (1969).
28. Smith, *Looking Beyond Race, supra* at 159.
29. Sachs, *Scholle v Hare, supra* at 1621.
30. Const 1963, art IV, § 6.
31. Stetson, *Michigan Unionists File Suit to Upset New Apportionment*, New York Times, June 22, 1963, p 11.
32. Kelly, Harbison, & Belz, *The American Constitution, supra* at 614–619; *Gray v Sanders*, 372 US 368; 83 S Ct 801; 9 L Ed 2d 821 (1963); *Wesberry v Sanders*, 376 US 1; 84 S Ct 526; 11 L Ed 2d 481 (1964); *Reynolds v Sims*, 377 US 533; 84 S Ct 1362; 12 L Ed 2d 506 (1964); *Lucas v 44th General Assembly of Colorado*, 377 US 713; 84 S Ct 1459; 12 L Ed 2d 632 (1964); *Swann v Adams*, 385 US 440; 87 S Ct 569; 17 L Ed 2d 501 (1964).
33. *Gray v Sanders, supra*.
34. Powe, Jr, *The Warren Court and American Politics* (Cambridge: Harvard Univ Press, 2000), pp 251–255.
35. Scholle may have turned to the federal courts to take the heat off the Michigan Supreme Court, which was now divided evenly between Republicans and Democrats, and still facing legislative threats. Barber, *Partisan Values, supra* at 409–410. See also Parrish, *The Politics of State Legislative Apportionment in Michigan* (M.A. Thesis, Univ of Mass, 1967), pp 137–144. The pivotal case was *Reynolds v Sims*, 377 US 533; 84 S Ct 1362; 12 L Ed 2d 506 (1964). See also Smith, *Looking Beyond Race, supra* at 160. Smith voted first for the Republican plan and then, after *Reynolds*, for the Democratic plan.
36. Barber, *Partisan values, supra* at 405.
37. Dunbar & May, *Michigan, supra* at 550, 576; Kelly, Harbison, & Belz, *The American Constitution, supra* at 619. Parrish, *Politics of State Legislative Apportionment, supra*, calculates that it was unlikely that the Democrats would have won control of the State Senate without the reapportionment.
38. Barber, *Partisan values, supra* at 418; Thernstrom & Thernstrom, *Whose Votes Count? Affirmative Action and Minority Voting Rights* (Cambridge: Harvard Univ Press, 1987).
39. Kelly, Harbison, & Belz, *The American Constitution, supra* at 703.